Supreme Court, U. S.
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IN THE

Supreme Court of the United States

September Term 1976

No. 76-1032

JACK CASEBEER WOOD, III,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Eighth Circuit

The Petitioner, Jack Casebeer Wood, III, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on December 6, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on December 6, 1976, and this petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether probable cause existed for the arrest of Petitioner where the only facts known to the agents were that the automobile Petitioner was driving was (1) registered to a suspected drug dealer's girlfriend; (2) it was seen in the vicinity of a previous drug transaction; (3) it was seen exiting a freeway ramp behind the suspected drug dealer's automobile approximately ten minutes before Petitioner's arrest but did not follow the suspected drug dealer's automobile, and (4) the suspected drug dealer's automobile was stopped and contraband was discovered.

Whether inculpatory statements made by the Petitioner after his arrest should have been suppressed where the statements were the fruits of an illegal arrest and were made after Petitioner requested counsel and was refused.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTORY PROVISIONS INVOLVED

21 U.S.C. 841(a)(1)

(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

STATEMENT OF THE CASE

(1) Petitioner was charged by indictment with possession of cocaine with intent to distribute in violation of 21 U.S.C. 841(a)(1).

(2) An evidentiary hearing was conducted to determine whether probable cause existed for the arrest of Petitioner and whether statements of Petitioner were obtained in violation of the Fifth Amendment.

(3) The evidence adduced at the evidentiary hearing disclosed that at the time of Petitioner's arrest the agents knew (1) The blue Camaro Petitioner was driving was owned by a drug trafficker's girlfriend; (2) The blue Camaro was seen in the vicinity of a drug transaction approximately an hour before Petitioner's arrest; (3) Approximately 20 minutes before Petitioner's arrest the blue Camaro was seen exiting a freeway ramp behind the suspected drug trafficker's automobile; (4) Ten minutes prior to the arrest of Petitioner the suspected drug trafficker's automobile was stopped and cocaine was discovered on the person of the driver. The evidence regarding the admissibility of statements disclosed that after the arrest Petitioner requested to talk to his lawyer but was denied.

(4) The trial court ruled that probable cause existed for the arrest of Petitioner and that the statements made were voluntarily. The Eighth Circuit Court of Appeals affirmed.

REASONS FOR GRANTING WRIT

(1) PROBABLE CAUSE DID NOT EXIST FOR THE ARREST OF PETITIONER AND THEREFORE THE CONTRABAND SEIZED INCIDENT TO THE ARREST SHOULD HAVE BEEN SUPPRESSED.

Probable cause to arrest depends "upon whether at the moment the arrest was made . . . the facts and circumstances within . . . (the arresting officer's) knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that . . . (suspect) had committed or is committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964). In assessing probable cause, the action of the arresting officers must be evaluated in light of the totality of the circumstances. *United States v. Regan*, 525 F.2d 1151, 1155 (8th Cir. 1975).

In Petitioner's case, the Eighth Circuit ruled that the search of the automobile Petitioner was driving was incident to a valid arrest. However, a close consideration of all of the facts and circumstances do not establish the requisite probable cause. Agents were stationed at the Holiday Village parking lot to conduct surveillance regarding an anticipated drug transaction. They had received a tip that a Bruce Bane would be involved in the transaction and they were to be on the lookout for two automobiles, a white Pontiac and a blue Camaro. The Camaro was owned by Bane's girlfriend. These automobiles were observed by the agents coming off of the interstate freeway going North on University Avenue. The white Pontiac driven by Bruce Bane turned West into the Holiday Village parking lot; however, the blue Camaro did not follow the Pontiac but proceeded North on University out of sight of the surveillance agents. The Pontiac automo-

bile was stopped after a short chase and cocaine was found on Bruce Bane's person.

The arrest of Bane took approximately ten minutes. The agents then ordered the arrest of the driver of the Camaro. Shortly thereafter the Camaro was stopped and the Petitioner was arrested. Incident to the arrest cocaine was found in the Camaro's trunk. Before Respondent's arrest the agents had no information regarding Petitioner being involved in Bruce Bane's drug transaction. The only facts to establish probable cause were that Petitioner was driving Bruce Bane's girlfriend's car sometime after Bruce Bane's arrest. It is submitted that these facts do not establish probable cause for the arrest of Petitioner. In fact, it was never established what crime Petitioner was arrested for prior to the search of the automobile he was driving. It is further submitted that the "tip" regarding the blue Camaro was not corroborated as the Camaro did not follow the Bane automobile into the Holiday Village parking lot but proceeded north, out of sight of any surveillance agents. Clearly, this fact could not give rise to a reasonable belief the automobiles were acting in concert.

Automobile search cases have been upheld by the Federal Courts where the evidence showed that the government agent received reliable information from a reliable informant that the automobile was carrying contraband and such information was at least partially verified by the agent's own investigation prior to the search. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Draper v. United States*, 358 U. S. 307 (1959). In *Brewer v. Wolf*, 529 F.2d 787 (8th Cir. 1976), the Eighth Circuit applying the *Aguilar* and *Draper* test held that the Government agents had probable cause to search the automobile. The *Brewer* case typifies automobile search cases, i.e., reliable

information verified by further investigation giving rise to probable cause to search the automobile in question.

In the case at bar these tests cannot even be applied. There is no reliable information that the blue Camaro automobile or the driver was carrying contraband. The fact that the blue Camaro was owned by a drug peddler's girlfriend and was seen in the vicinity of a drug transaction may be suspicious, possibly giving rise to an investigative stop. However, absent reliable information or knowledge of suspicious conduct indicating that the automobile was carrying contraband, there simply is a void of articulable facts to support probable cause for a full blown search and seizure of the automobile. Accordingly, the contraband seized should have been suppressed.

(2) THE INCULPATORY STATEMENTS MADE BY PETITIONER AFTER HIS ARREST SHOULD HAVE BEEN SUPPRESSED BASED UPON TWO GROUNDS ANY OF ONE OF WHICH IS SUFFICIENT. FIRST, THE STATEMENTS WERE A PRODUCT OF AN ILLEGAL ARREST, AND SECOND, THE GOVERNMENT AGENTS DID NOT HONOR RESPONDENT'S REQUEST TO TALK TO AN ATTORNEY BEFORE QUESTIONING.

A. *ILLEGAL ARREST.* Inculpatory statements obtained after an illegal arrest are inadmissible as "fruit of the poisonous tree". *Nardone v. United States*, 308 U.S. 338 (1939). The one exception is where the Government can sustain its burden of showing that the inculpatory statements were not obtained by exploitation of the illegal arrest. *Wong Sun v. United States*, 371 U.S. 471 (1963). The courts in deciding whether the statements come within this exception will look to the proximity in time between the illegal arrest and the inculpatory statements and whether the statements were the

product of Respondent's own free will. *Wong Sun v. United States*, supra. The fact that the Miranda warnings were given after the illegal arrest does not per se purge the primary taint. *Brown v. Illinois*, 422 U.S. 590 (1974); *U. S. v. Shavers*, 18 Cr. L. 2192 (8th Cir. 1976).

In the instant case the inculpatory statements were given in close proximity to the arrest. In addition, it could hardly be argued that the inculpatory statements were of Petitioner's own free will where, besides being illegally arrested, he was refused counsel before questioning. Accordingly, the statements should have been suppressed.

B. *REFUSAL OF COUNSEL BEFORE QUESTIONING.* On at least one occasion after the Miranda warnings were given and before being questioned the Petitioner asked to talk to his lawyer. Agent Shanley who transported Petitioner to the Federal Court House testified:

Q. Did you ask him any questions?

A. Yes I did.

Q. What questions did you ask him?

A. I asked him if it was his cocaine which was seized from the trunk of the vehicle.

Q. And what did he say?

A. He said he wanted to talk to his lawyers. (3-8 Tr. p. 8. L. 18-24)

Agent Shanley ignored the request of Petitioner. Instead he turned Petitioner over to Agent Boulger at the Drug Enforcement Office for questioning without advising Boulger of Defendant's request.

Petitioner testified that he asked to talk to his lawyer on three different occasions. However, even assuming the truth of the Government's witnesses there can be no question that

the defendant was denied his rights under the Fifth Amendment (self incrimination) and the Sixth Amendment (right to counsel). *Miranda v. Arizona*, 384 U.S. 436 (1966).

In *Michigan v. Mosley*, 96 S. Ct. 32, (1975), the Supreme Court held that a bank robbery suspect's assertion of his right to remain silent, which was immediately honored by police robbery detectives, did not render inadmissible the suspects inculpatory statement about an unrelated murder obtained during second custodial interrogation held more than two hours later by homicide detectives who had given him fresh Miranda warnings. In *Mosley* the court reasoned that since the questioning was for a separate and different crime two hours after Mosley's desire to remain silent was "scrupulously honored", and the homicide investigator gave fresh Miranda warnings, the inculpatory statements were not obtained in violation of the Miranda decision. The court further pointed out that Mosley did not ask for counsel but merely stated his desire to remain silent. The Supreme Court, citing the *Miranda* opinion said:

> The present case does not involve the procedures to be followed if the person in custody asks to consult with a lawyer since Mosley made no such request at any time. Those procedures are detailed in the *Miranda* opinion as follows:
>
> *If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.* At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to the police, they must respect his decision to remain silent. 384 U. S. at 473 (Emphasis Supplied).

Again, at Footnote 10 the Supreme Court stressed the difference between remaining silent and requesting counsel:

> The dissenting opinion asserts that *Miranda* established a requirement that once a person has indicated a desire to remain silent, questioning may be resumed only when counsel is present. *Post,* at 6-7. But clearly the Court in *Miranda* imposed no such requirements, for it distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that "the interrogation must cease until an attorney is present" only "[i]f the individual states that he wants an attorney." 384 U.S. at 474.

Mr. Justice White in his concurring opinion also recognized the per se rule of ceasing interrogation once the individual in custody asserts his right to counsel.

Contrasting the *Mosley* decision with the instant case discloses that all of the factors relied on by the Court in *Mosley* are absent here:

(1) The questioning of Defendant by the different agents was for the same crime;

(2) The lapse in questioning was for minutes, not hours;

(3) Defendant's request to talk to an attorney was not "scrupulously honored" but to the contrary was ignored throughout the investigation;

(4) Agent Boulger, according to his own testimony, did not repeat the *Miranda* warnings to Defendant; and,

(5) Defendant did not refuse to answer but requested to talk to an attorney, thereby outlawing any further questioning until his request was honored.

The Government cannot escape suppression by arguing that the "lengthy discussion" between Boulger and Petitioner was not an interrogation. Notwithstanding what Agent Boulger labeled the colloquoy, it was clearly an interrogation. Agent Boulger "asked questions to fill in any holes in the story" and the questioning was in a small booking room in the presence of three other agents. If a lawyer had been called as requested clearly the lawyer would have advised his client to remain silent.

In summary, *Miranda v. Arizona,* supra, requires the Government, once counsel is requested, to leave Defendant alone until it provides him with at least a phone call to his attorney. The authorities may then communicate with him through an attorney. *Michigan v. Mosley,* supra, Footnote 2 of Justice White's concurring opinion. Since the agents failed to honor Petitioner's request all statements should have been suppressed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted.

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Dated: January 3, 1977.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-1493

UNITED STATES OF AMERICA,
Appellee,
v.
JACK CASEBEER WOOD, III,
Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA.

Submitted: October 15, 1976
Filed: December 6, 1976

Before VAN OOSTERHOUT, Senior Circuit Judge, and HEANEY and BRIGHT, Circuit Judges.

HEANEY, Circuit Judge.

Jack Casebeer Wood, III, appeals from his conviction of possession of cocaine with intent to distribute in violation of 21 U.S.C. §841(a). Wood claims that his warrantless arrest and the warrantless search of the car he was driving were made without probable cause and, therefore, inculpatory statements he made while in custody, and cocaine seized from the trunk of the car, should have been suppressed. He also claims that certain inculpatory statements should have been

suppressed because they were obtained during an interrogation conducted after his repeated requests for counsel were denied. We affirm.

At approximately 1:40 P.M. on November 14, 1975, Agent Marcus Kryger of the Federal Drug Enforcement Administration was stationed in the Holiday Village North parking lot near the junction of University Avenue N.E. and Interstate 694 in Fridley, Minnesota, with instructions to observe an anticipated drug transaction. He had been informed by a state agent that a drug transaction involving Bruce Bane, a suspected narcotics dealer, was anticipated at the point of his surveillance. He had been further informed that the transaction would involve a white Pontiac Grand Prix and a blue Chevrolet Camaro which was registered to the girlfriend of Bruce Bane. Both vehicles were reported to Kryger as having been seen together in the vicinity of a suspected drug transaction twenty to thirty minutes earlier.

Agent Kryger observed a white Pontiac Grand Prix and a blue Chevrolet Camaro exiting Interstate 694 at University Avenue N.E. from approximately one hundred yards away. The blue Camaro was traveling immediately behind the white Pontiac. Using binoculars, Agent Kryger recognized the driver of the Pontiac to be Bruce Bane. He did not recognize the driver of the Camaro, but he was able to read the vehicle's license number which he recognized to be that registered to Bane's girlfriend.

After exiting the freeway, the Pontiac entered the Holiday Village North parking lot, then turned back onto University Avenue, traveled north for a few blocks, and entered the parking lot of a drive-in restaurant. At that point, Agent Kryger attempted to stop the vehicle and a high-speed chase ensued. During the chase, Bane was observed strewing white powder

out of the window of the vehicle. After the Pontiac was stopped, Bane was searched and some white powder found on his person was identified by a field test to be cocaine. Agent Kryger then issued a radio alert ordering the stop of the blue Camaro which had turned north off the freeway and continued out of his sight.

The Camaro was stopped shortly thereafter by a local police officer. Wood, the driver of the vehicle, was ordered out of the car. Other officers arrived, including Agent Shanley of the Minnesota Bureau of Criminal Apprehension who was involved in the investigation of Bruce Bane. The car was searched and cocaine, wrapped in a magazine, was found in the trunk. Agent Shanley advised Wood of his *Miranda* rights and Wood acknowledged that he understood them.

Wood was transported to the Federal Building in Agent Shanley's squad car. During the ride, Agent Shanley asked Wood if the cocaine found in the trunk of the Camaro belonged to him. Wood replied that he wanted to talk to his attorney, and questioning ceased. Wood, however, subsequently volunteered several statements of an incriminating nature.

Upon arrival at the Federal Building, Wood was taken to the D.E.A. booking room and turned over to Agent John Boulger. Wood testified at trial that he asked to see his attorney upon his arrival in the booking room and that this request was denied. Agent Boulger testified that Wood make no such request. During the booking procedure which followed, Wood proceeded to discuss the drug transaction that had been planned and his involvement in it. Agent Boulger testified that although he "may have asked questions to fill in any holes" in Wood's story while he was relating it, Wood had expressed a desire to cooperate with the government of his own accord and had initiated the conversation during which

the statements were made. When asked by Agent Boulger to sign a statement confirming what he had said, Wood refused and asked to speak to his attorney. The booking procedure was completed without further discussion.

I

Wood contends that, at the time Agent Kryger's radio alert was issued, the agents did not possess sufficient information linking him or the automobile he was driving to the Bane transaction to establish probable cause for his arrest or for the search of the Camaro.[1] Consequently, Wood argues that the cocaine seized from the trunk of the car, and all inculpatory statements he made after his arrest, should have been suppressed. We disagree.

Probable cause to arrest depends "upon whether, at the moment the arrest was made, * * * the facts and circumstances within * * * [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the * * * [suspect] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964). *Accord, Kelley v. Swenson*, 510 F.2d 264, 266 (8th Cir. 1975); *United States v. Peep*, 490 F.2d 903, 906 (8th Cir. 1974). In assessing probable cause, we must evaluate the action of the arresting officers in light of the totality of the circumstances. *United States v. Regan*, 525 F.2d 1151, 1155 (8th Cir. 1975); *United States v. Peep, supra* at 907.

After considering all the facts and circumstances, we believe there was probable cause for Wood's arrest and, correspond-

[1] Wood agrees that, given probable cause to believe that the Camaro contained contraband, the trunk of the car could have been searched either at the scene where the automobile was stopped or later at the station house. *Texas v. White*, 423 U.S. 67 (1975); *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970).

ingly, for the search of the blue Camaro for contraband. *See Chambers v. Maroney*, 399 U.S. 42, 47-48 (1970). State agents had been informed that drug transactions would occur in the parking lots at Schillers and at Holiday Village North early in the afternoon of November 14. Additionally, it was anticipated that Bruce Bane would be a participant in the drug transactions, and that a white Pontiac and a blue Camaro would be used by parties involved in the transactions. While the state agents did not testify as to either the reliability of the informant or the basis of the informant's knowledge,[2] the tip certainly formed a sufficient basis for the two locations to be placed under surveillance. Several of the essential details of the tip were corroborated[3] when two vehicles, one driven by Bane and both matching the descriptions given, arrived near the site of the second anticipated transaction only minutes after they had been observed in the vicinity of the first anticipated transaction.

Additionally, from these facts, the agents could reasonably conclude that the drivers of the two vehicles were acting in concert. *See Cochran v. United States*, 389 F.2d 326, 327 (10th Cir.), *cert. denied*, 391 U.S. 913, *rehearing denied*, 393 U.S. 899 (1968); *Sanchez v. United States*, 311 F.2d 327, 329-330 (9th Cir. 1962), *cert. denied*, 373 U.S. 949 (1963).

At this point, Agent Kryger, who had been assigned to observe this location, had probable cause to make an investigatory stop of either or both of the cars. When he attempted to stop the car driven by Bane, a high-speed chase ensued, and

[2] *See Whiteley v. Warden*, 401 U.S. 560, 568 (1971); *United States v. Wixom*, 460 F.2d 206, 208 (1972). Had the arrest or search been based on the tip alone, we would agree that its validity could not be sustained.

[3] *See Spinelli v. United States*, 393 U.S. 410, 415-416 (1969); *Draper v. United States*, 358 U.S. 307 (1959); *Brewer v. Wolff*, 529 F.2d 787, 791 (8th Cir. 1976).

Bane was observed throwing a white powder out of the window of the car. When field tests revealed that the white powder was cocaine, probable cause clearly existed to arrest the driver of the Camaro and to search the car. *See Spinelli v. United States*, 393 U.S. 410, 417-418 (1969); *Wangrow v. United States*, 399 F.2d 105, 113 (8th Cir.), *cert. denied*, 393 U.S. 933 (1968). *Cf. United States v. Dalli*, 424 F.2d 45, 48 (2nd Cir.), *cert. denied*, 400 U.S. 821 (1970).

II

Wood, citing *Miranda v. Arizona*, 384 U.S. 436 (1966), next contends that the statements he made in the D.E.A. booking room should have been suppressed because they were elicited during questioning conducted after his repeated requests for counsel were denied, in violation of his Fifth and Sixth Amendment rights. The government responds that Wood's statements were voluntary and, thus, fall outside the *Miranda* rule.

Voluntary statements of any kind, not made in response to police interrogation, are not barred by the Fifth Amendment and their admissibility is unaffected by *Miranda* and its progeny. *Miranda v. Arizona*, supra at 478; *United States v. Cook*, 530 F.2d 145, 152-153 (7th Cir.), *cert. denied*, 96 S.Ct. 2234 (1976); *United States v. Martin*, 511 F.2d 148, 150-151 (8th Cir. 1975); *United States v. Menichino*, 497 F.2d 935, 939-941 (5th Cir. 1974); *Caton v. United States*, 407 F.2d 367, 374 (8th Cir.), *cert. denied*, 395 U.S. 984 (1969). The trial court, after a hearing on Wood's motion to suppress, found that Wood's inculpatory statements were voluntarily made and were not the result of questioning or coercion. Our review of the record convinces us that those findings are supported by substantial evidence and that no clear error appears. *See Mullins v. United States*, 487 F.2d 581, 589 (8th Cir. 1973); *Gullett v. United States*, 387 F.2d 307, 309 (8th Cir.), *cert. denied*, 390 U.S. 1044 (1967). Accordingly, we find no merit in Wood's contention that his statements should have been suppressed.

Judgment affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.